(6)

No. 96-1033-CFX Title: Lords Landing Village Condominium Council of Unit Owners, Petitioner
Status: DECIDED v.
Continental Insurance Company

Docketed:
December 27, 1996 Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Thorton,Kevin

Counsel for respondent: Schmieler,Jeffrey R.

Entry	Date	Note	Proceedings and Orders
19	May 19 1996		REDISTRIBUTED. May 22, 1997 (Page 15)
1	Nov 19 1996	G	Application (A96-365) to extend the time to file a petition for a writ of certiorari from December 2, 1996 to January 30, 1997, submitted to The Chief Justice.
2	Nov 21 1996		Application (A96-365) granted by the Chief Justice extending the time to file until January 1, 1997.
3	Dec 27 1996	G	Petition for writ of certiorari filed. (Response due January 26, 1997)
4	Jan 21 1997		Waiver of right of respondent Continental Insurance Company to respond filed.
5	Jan 22 1997		DISTRIBUTED. February 14, 1997 (Page 29)
6	Feb 5 1997	F	Response requested -- AS.
7	Mar 7 1997		Brief of respondent Continental Insurance Company in opposition filed.
9	Mar 18 1997		Reply brief of petitioner Lords Landing Village Condominium Council of Unit Owners filed.
8	Mar 19 1997		REDISTRIBUTED. April 11, 1997 (Page 1)
11	Apr 14 1997		REDISTRIBUTED. April 18, 1997 (Page 13)
13	Apr 21 1997		REDISTRIBUTED. April 23, 1997 (Page 10)
15	May 5 1997		REDISTRIBUTED. May 8, 1997 (Page 25)
17	May 12 1997		REDISTRIBUTED. May 15, 1997 (Page 12)
21	May 27 1997		REDISTRIBUTED. May 29, 1997 (Page 12)
22	Jun 2 1997		Petition GRANTED. Judgment VACATED and case REMANDED Dissenting opinion by the Chief Justice with whom Justice Breyer joins. Opinion per curiam.

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(1) Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LORDS LANDING VILLAGE CONDOMINIUM
COUNCIL OF UNIT OWNERS,

Petitioner,

v.

CONTINENTAL INSURANCE COMPANY,

Respondent.

Petition For Writ of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether principles of federalism require federal appellate courts to follow a controlling intervening state court decision that is filed before the federal appellate court issues its judgment and which specifically rejects the standard used and the case law relied on by the federal appellate court if the federal appellate court becomes aware of the controlling state court decision before the date that a Petition for Certiorari is due in this Court.

2. Whether orderly administration of state law in federal courts requires federal appellate courts to follow a controlling intervening state court decision that is filed before the federal appellate court issues its judgment and which specifically rejects the standard used and the case law relied on by the federal appellate court if the federal appellate court becomes aware of the controlling state court decision before the date that a Petition for Certiorari is due in this Court.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

LORDS LANDING VILLAGE CONDOMINIUM
COUNCIL OF UNIT OWNERS,

Petitioner,

v.

CONTINENTAL INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported. App. 1a. The District Court entered its Final Order on July 10, 1995. App. 12a.

JURISDICTION

i The judgment and opinion sought to be reviewed was entered by the Fourth Circuit in an unpublished opinion on August 6, 1996. App. 1a. Petitioner also seeks review of the Court of Appeals Order denying Petitioner's Petition to Recall and Stay Mandate and to Renew Appellant's Motion for Rehearing and En Banc Review and/or Leave to File a Second Petition for Rehearing and En

Banc Review Because of a Controlling Change in Maryland Law While Case Was Pending that was entered on December 16, 1996. App. 10a.

ii Petitioner filed a timely Petition for Rehearing that was denied on September 3, 1996. App. 5a.

iii Petitioner filed a Motion to Recall and Stay Mandate and to Renew Appellant's Motion for Rehearing and En Banc Review and/or Leave to File a Second Petition for Rehearing and En Banc Review Because of a Controlling Change in Maryland Law While Case Was Pending on September 20, 1996 and the Petition was denied on December 16, 1996.

iv On November 21, 1996 the Chief Justice extended Petitioner's time to file its Petition for Certiorari to and including January 1, 1997. App. 8a.

The Jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTORY PROVISION INVOLVED

MD. REAL PROP. CODE ANN. §10-202 (1988 Replacement Volume).

MD. REAL PROP. CODE ANN. §10-203 (1988 Replacement Volume).

MD. REAL PROP. CODE ANN. §11-131 (1995 Supp.).

MD. COMMERCIAL LAW CODE ANN. § 13-301 (1995 Supp.).

STATEMENT

Petitioner, Lords Landing Condominium Council of Unit Owners[1], (The Unit Owners), brought suit against Respondent Continental Insurance Company, (Continental), in the Circuit Court for Prince George's County, Maryland for breach of a Commercial Liability Insurance Policy. The unit owners had obtained a $1.1 million dollar judgment against Continental's insured for damages arising out of work performed by the insured's subcontractors in constructing the Condominium. The Judgment against Continental's insured was based on misrepresentations and omissions under Maryland's Consumer Protection statute and breach of implied and express statutory warranties under Maryland's Real Property Code.[2] The unit owners sued Continental under a state subrogation statue for failing to pay that judgment.

Continental removed the action pursuant to 28 USC § 1446(a) to the federal district court for Maryland. Jurisdiction of the district court was invoked because of diversity of citizenship pursuant 28 USC § 1332.

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1 Petitioner does not have any parent companies or subsidiaries.

2 Petitioner's sued Continental under §§ 10-202 - 10-203 and 11-131 of Maryland's Real Property Code and §§ 13-301(1) 13-301(2), 13-301(3) and 13-301(9) of Maryland's Consumer Protection Counts. The jury found for Continental's insured on each Consumer Protection Count that required scienter but the jury found against Continental's insured for misrepresentations, omissions, or statements by the insured regarding the quality, useful life or characteristics of the common elements. App. 25a - 26a. The jury found for Petitioner on each of the express and implied warranty counts. App. 24a - 25a.

The threshold question in this case was whether the property damage giving rise to the $1.1 million verdict was caused by an occurrence. The district court applied an objective test for occurrence and held that as a matter of law, property damage that is the natural, probable consequences of poor workmanship and omissions is not caused by an occurrence as defined by the policy. App. 3a. The Court of Appeals for the Fourth Circuit affirmed the trial court on August 6, 1996 and it rejected the unit owners argument that Maryland State law required an occurrence to be determined by a subjective test that viewed the accident component of an occurrence from the prospective of whether the insured intended or expected the damage. App. 3a.

(A) Intervening Controlling Decision By Maryland's Highest Court

Of primary importance to the consideration of the questions presented in this case is the serious doubt that an intervening decision by Maryland's highest court casts on the validity of the Fourth Circuit's affirmance of the trial court. Maryland's highest court, on July 26, 1996, issued a controlling decision on what constitutes an occurrence or accident under Maryland insurance law. ***Sheets v. Brethern Mutual***, 342 Md. 634, 679 A.2d 540 (1996). Neither the parties nor the Fourth Circuit were aware of this decision prior to the Fourth Circuit's ruling on August 6, 1996. See part B infra. The following is a comparison of the Fourth Circuit's ruling with the intervening Maryland decision.

1. In its August 6, 1996 opinion the Fourth Circuit affirmed the trial court and defined the issue as follows:

The district court held that as a matter of law,

> property damage that is the natural, probable consequence of poor workmanship and omissions is not caused by an occurrence as defined by the policy. The court noted that there was no occurrence whether it was the subcontractor or a general contractor that was involved.
>
> Appealing the district court's judgment the unit owners contend that "the accident component of an occurrence must be viewed subjectively, and where the injury is not expected or intended from the standpoint of the insured an occurrence takes place." This contention, however, is based on the policy's exclusions and fails to take into account the policy's threshold requirement that property damage be caused by an "occurrence."
>
> ...Accordingly, we must first address whether the loss was caused by an occurrence or accident.

App. 3a.

2. In its July 26, 1996 decision the Maryland Court Of Appeals rejected the natural and probable consequences test.

(a) Maryland's highest court explained that the adoption of an objective test would render the policy meaningless.

> If we were to adopt an objective standard and hold that the term `accident' as used in

> liability insurance policies excludes coverage for damage that *should have* been foreseen or expected by the insured, such insurance policies would be rendered all but meaningless.

Id. *Sheets*, 342 Md. at 653, 679 A.2d at 549

(b) When analyzing cases that applied the natural and probable consequences test Maryland's highest Court said:

> The leading cases holding that liability insurance policies covering damages caused by "accident" do not cover damages which are the natural and probable consequences of negligent acts were decided by the United States Court of Appeals for the Tenth Circuit...
>
> The troublesome aspect of these cases is that their interpretation of the term "accident" severely limits the applicability of general liability policies:
>
> > "[E]ven... those courts which follow [this interpretation recognize]... that it so greatly restricts the insurer's liability as to render the policy valueless or even meaningless, and denies coverage for what is the predicate of any likely liability against the insured. As one court has pointed out, the

> insured himself is not liable where damage or injury is the unforeseeable result of his negligence; and where the damage or injury is foreseeable, so that the insured is liable, his insurer is not liable..." (Footnotes omitted).

Id. *Sheets*, 342 Md. at 646-647, 679 A.2d at 546.

3. Maryland's highest court then announced a subjective test for determining the accident component of an occurrence.

> Although our prior cases may have been less than clear in explaining the relevant inquiry, we hold today that an act of negligence constitutes an "accident" under a liability insurance policy when the resulting damage was "`an event that takes place without [the insured's] foresight or expectation.'" *Harleysville*, 248 Md. at 154, 235 A.2d at 559 (citation omitted). In other words, when a negligent act causes damage that is unforeseen or unexpected by the insured, the act is an "accident" under a general liability policy. *Accord Bundy*, 298 F.2d at 153 (holding that negligent manufacture of metal tubing was an accident because resulting damage was "unforeseen, unexpected and unintended"); *First Newton Nat. Bank v. Gen. Cas. Co.*, 426 N.W.2d 618, 625 (Iowa 1988) (holding that there is an accident if the insured "does not expect or intend both it and some injury");

> *Hauenstein v. Saint Paul-Mercury Indem. Co.*, 242 Minn. 354, 65 N.W.2d 122, 126 (1954) (holding that an accident is an "unexpected, unforeseen, or undesigned happening or consequence").

Id. *Sheets*, 342 Md. at 652, 679 A.2d at 548-549.

4. The Fourth Circuit rested its decision on the holding in *IA Construction Corp. v. T & T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (D.Md. 1993); *Ed Winkler & Son, Inc. v. Ohio Casualty Insurance Co.*, 441 A.2d 1129, 1132 (Md. App. 1980), and Appleman, Insurance Law and Practice Volume 7A § 4492 and stated:

> "Under Maryland law in the context of insurance law `accident' means an `undersigned, sudden and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force, but it does not mean the natural and ordinary consequences of a negligent act.'" *IA Construction Corp. v. T & T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (D.Md. 1993) (quoting *Ed. Winkler & Son, Inc. v. Ohio Casualty Ins. Co.*, 441 A.2d 1129, 1132 (Md. App. 1980) (quoting 7A Appleman, Insurance Law and Practice § 4492 at 17 (Berdal ed. 1979))) (holding that claims against contractor for work performed in reliance upon negligent work of another contractor did not constitute "occurrence" under general liability policy). Occurrence "does not include the normal, expected consequences of poor workmanship."

Reliance Ins. Co. v. Mogavero, 640 F. Supp. 84, 86 (D.Md. 1986).

App. 3a - 4a.

5. In its July 26 opinion in *Sheets* the Maryland Court of Appeals expressly rejected the cases relied on by the Fourth Circuit and the test for "accident" applied in *Ed Winkler*, *IA Construction*, and 7A § 4442 of Appleman, and stated:

> We recognize that our holding today may be inconsistent with language in at least one Court of Special Appeals opinion that focused on the foreseeability of damage to determine whether negligence constituted, an accident. In *Ed Winkler & Son v. Ohio Cas. Ins.*, 51 Md. App. 190, 441 A.2d 1129 (1982), the Court of Special Appeals held that a wrongful accusation of theft by an insured was not an "accident." 51 Md. App. at 195-96, 441 A.2d at 1132-33. Stating that an "accident" is not "`the natural and ordinary consequences of a negligent act,'" *Ed Winkler*, 51 Md. App. at 195, 441 A.2d at 1132, the intermediate appellate court relied on Appleman's INSURANCE LAW AND PRACTICE, which in turn relied on the Tenth Circuit. See 7A INSURANCE LAW AND PRACTICE § 4492 at 17 (*citing Neale supra*). For the reasons we have explained, *supra*, we decline to adopt this restrictive interpretation of the term accident. Accordingly, to the extent *Ed Winkler* is inconsistent with our holding today, it is disapproved.[4]

Id. Sheets, 342 Md. at 654, 679 A.2d at 550.

> 4 At least one other case applying Maryland law has also relied on *Ed Winkler & Son v. Ohio Cas. Ins.*, 51 Md. App. 190, 441 A.2d 1129 (1982), for the proposition that an "accident" is not "`the natural and ordinary consequences of a negligent act.'" *Ed Winkler*, 51, Md. App. at 195, 441 A.2d at 1132. *See IA Constr. Corp. v. T & T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (D.Md. 1993) (holding that a surveying error is not an "occurrence" under Maryland law).

Id. Sheets, 342 Md. at 654, 679 A.2d at 550 footnote 4.

(B) Unusual Timing Of The Maryland Court's Decision

In the present case the controlling Maryland Court of Appeals decision was rendered on July 26, 1996 and thus was in effect prior to the Fourth Circuit's ruling. The Appeals Court and the parties were unaware of the decision because the West Advance Sheets containing the *Sheets'* decision did not come out until September 6, 1996. These advance sheets are mailed by bulk mail and they do not reach law offices and libraries for five to eight days from the date of the advance sheets are mailed.[3] Thus, the West Advance

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An Affidavit from the Circulation/Reference Librarian of the University of Baltimore Law Library was filed with the Fourth Circuit. This Affidavit shows that the West Advance Sheets containing the Maryland Reporters did not reach law libraries until September 13, 1996. The West Atlantic Second Advance Sheets for Maryland did not reach law libraries until September 18, 1996. App. 13a. An Affidavit from counsel's receptionist and a fax transmission from West Publishing Co. was also

Sheets would have reached libraries after the mandate was issued.

On Tuesday evening at approximately 8:00 p.m. on September 17, 1996 counsel reviewed the "words and phrases" section of the West Atlantic Second advance sheet dated September 6, 1996 and discovered that the Maryland Court of Appeals had ruled in the *Sheets* decision. Counsel read the decision that night, researched the issue of recalling the mandate and application of intervening state law the next day, drafted the Petition to Recall on Thursday and filed it with the Fourth Circuit Court of Appeals on Friday, September 20, 1996.

Respondent in its October 8, 1996 Opposition to the Petition to Recall pointed out that a legal publication in Baltimore Maryland, The Daily Record, had reported the *Sheets* decision before the Fourth Circuit's August 6, 1996 opinion and that *Sheets* had become available on Lexis on August 7, 1996. However, it appears that Respondent's counsel, like Petitioner's counsel, was unaware of the decision because no effort was made by Respondent to inform the court of the decision. In any case the Appeals Court did not have any opportunity to apply *Sheets* before it rendered its August 6, 1996 opinion.

(C) Proceedings Below

The Fourth Circuit issued its opinion on August 6, 1996. The unit owners on August 16, 1996 filed a timely Request for a Rehearing and Suggestion for Rehearing En

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filed with the Fourth Circuit. App. 15a - 17a.

Banc which was denied on September 3, 1996. App. 5a. The mandate was issued on September 11, 1996. App. 6a. On September 20 the unit owners filed their:

> "Petition to Recall and Stay Mandate and to Renew Appellant's Motion for Rehearing and En Banc Review and/or Leave to File a Second Petition for Rehearing and En Banc Review Because of a Controlling Change in Maryland Law While Case Was Pending." (Motion to Recall)

After reviewing the Motion to Recall the Fourth Circuit, on October 1, 1996, requested that Respondent "file a response to Appellant's Petition for rehearing and suggestion for rehearing in banc." App. 7a. Respondent filed its response on October 8, 1996 and one of the issues Respondent raised was the authority of the Fourth Circuit to recall the mandate and rehear the case after the issuance of the mandate. The unit owners then filed a reply on October 11, 1996. The Fourth Circuit denied the Petition to Recall on December 16, 1996. App. 10a.

The unit owners Petition for Writ of Certiorari was originally due before this Court on December 2, 1996. The unit owners applied for an extension of time to allow the Fourth Circuit to make a ruling and Chief Justice Rehnquist granted an extension through and including January 1, 1997. App. 8a.

REASONS FOR GRANTING PETITION

In its July 26, 1996 opinion Maryland's highest court rejected the natural probable consequences test for determining what constitutes an occurrence and explained

that if they were "to adopt an objective standard ... such insurance policies would be rendered all but meaningless." Maryland's highest court clarified any confusion in its prior case law and it specifically rejected the test for "accident" applied in the very cases relied on by the district court and Fourth Circuit below. Compare *Sheets*, 342 Md. at 652 - 654, 679 A.2d at 548-550 with the Fourth Circuits' August 6, 1996 Opinion in this case. App. 1a.

The Circuit Court's failure to follow the law of the state of Maryland conflicts with well reasoned and long established principles of federalism. The Circuit Court's decision denied the unit owners the benefit of the laws of forum state and applied a test that rendered the policy of insurance virtually meaningless under Maryland law. In addition to the important questions of federalism that this case raises it also provides this court with a rare opportunity to offer guidance to federal courts on the orderly administration of state law in the federal judicial system.

I. The Failure Of The Court Of Appeals To Apply Intervening Judicial Decisions Of Maryland's Highest Court Is In Conflict With Decisions Of This Court.

In our system of federalism *Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum state that is in existence at the time it renders its decision absent a federal statutory or constitutional directive to the contrary. *Salve Regina College v. Russell*, 499 U.S. 225, 226, 111 S.Ct. 1217, 1218 (1991); *Erie Railroad Co. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). Similarly where a federal court of appeals' decision on a point of state law is cast in doubt by an intervening decision of a states highest court while the case is on direct review it has become the practice of this court to vacate and remand so that the

question can be decided by judges familiar with state law. *Stutson v. U.S.*, __ U.S. __, 116 S.Ct 611, 612 (1996) (Scalia J. dissenting) (citing *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S.Ct. 1015, 1018 (1944), *Lawrence On Behalf Of Lawrence v. Chater*, ___ U.S. ___ 116 S.Ct. 604, 606-608 (1996); See *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 540-543, 61 S.Ct. 347, 349-350 (1941); *Blaauw v. Grand Trunk Western R. Co.*, 380 U.S. 127, 85 S.Ct. 806 (1965); *Conner v. Simler*, 367 U.S. 486, 81 S.Ct. 1679 (1961); *See also United States v. Security Industrial Bank*, 459 U.S. 70, 81, 103 S.Ct. 407, 413 (1982) (the principle that... judicial decisions operate retrospectively is familiar to every law student); *Bradley v. Richmond School Board*, 416 U.S. 696, 711; 94 S.Ct 2006, 2016 (1974) (distinction between applying a change in the law before time to petition for certiorari has passed and after final judgment); *Linkletter v. Walker*, 381 U.S. 618, 622, 85 S.Ct. 1731, 1734 (1965) (distinction between cases still pending on direct review and finality of judgments).

The failure of the Fourth Circuit to apply an intervening judicial decision of Maryland's highest court in a diversity case places its August 8, 1996 decision squarely in conflict with the above cited decisions of this court. This case presents a rare opportunity for this court to reinforce the principles of federalism upon which diversity jurisdiction is based and to enforce *Erie's* mandate.

The unit owners have argued throughout this litigation that Maryland courts applied a subjective analysis to determine if an occurrence took place and the Fourth Circuit's decision denied the unit owners the benefit of applying the law of the forum state to the issues presented in this case.

II. This Case Raises An Important Question Of The Orderly Administration Of State Law In Federal Courts.

Equally important, however, is the opportunity this case gives the court to review the orderly administration of state laws in federal courts. When an intervening judicial decision of a state's highest court comes down so shortly before a federal appeals court decision that it is not applied by the federal court, the federal court should rehear the case if the state court decision is brought to its attention before the time that a petition for certiorari is due in this Court. If the appellate court waits to see if this court grants, cert, vacates and remands, it will only diminish this court's scarce resources. *See Lawrence On Behalf Of Lawrence v. Chater*, _ U.S. ___, 116 S.Ct 604, 606 (1996); *See also Robinson v. Story*, 469 U.S. 1081, 105 S.Ct. 583 (1984). *See also Braniff Airways, Inc. v. Curtiss Wright Corporation*, 424 F.2d 427, 430 (1970).

Considering the difficulty of securing review in this court in diversity cases, lower federal courts rarely obtain guidance on the issue of orderly administration of state law in the federal system. This has led to conflicting opinions about when circuit court's should apply the ruling of this Court in *Huddleston v. Dwyer*, 322 U.S. 232, 236, 64 S.Ct. 1015, 1017 (1944). The Second Circuit has recognized that this Court has not defined "precisely what the bounds of the term `sub judice' might be" and it has viewed *Huddleston* as authority to rehear cases based on intervening state law even after Certiorari has been granted. *Braniff Airways, Inc. v. Curtiss-Wright Corporation*, 424 F.2d 427 at 429-430 (2nd Cir. 1970), *Cert denied* 400 U.S. 829 (1970). The Second Circuit has also cited Huddleston for the proposition that mandates should be recalled and rehearings granted when an

intervening decision of this Court comes down before a panel decision is rendered. *Marino v. Ortiz*, 888 F.2d 12, 13 (2nd Cir. 1989) *Cert denied* 495 U.S. 931 (1990); *Davis v. Smith*, 607 F.2d 535, 540 (2nd Cir. 1978).

The Ninth Circuit, at least, in cases where decisions of this Court are involved, will recall a mandate and rehear the case in light of intervening decisions that come down after the federal appeals court has ruled. *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988).

The First Circuit, however, has questioned the authority of an appeals court to ever recall a mandate and rehear a case in light of an intervening decision of a state court. *Boston and Maine Corp. v. Town of Hampton*, 7 F.3d 281, 252 (1st Cir. 1993). Moreover, unlike the Second Circuit, the First Circuit does not see *Huddleston* as authority for applying state decisional law after the mandate has issued but before the time for filing a petition for certiorari has run. Id. 7 F.3d at 282.

In the present case the Fourth Circuit has refused to recall its mandate even though the intervening state court decision came down before it rendered its opinion. This puts the Fourth Circuit in direct conflict with holdings of the Second Circuit and decisions of this Court involving "pending" cases.

In *Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016 (1974) this Court held that changes in the law should be given effect while the case was pending. The Court further pointed out that pending cases were distinguished from final judgments by the lapse or exhaustion of the "availability of appeal" or the passing of the time to petition for certiorari. Id. *Bradley*, 416 U.S. at 711, 94 S.Ct.

at 2016 footnote 14. This holding was based in large part on cases involving retroactive application of state decisional law. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 849, 110 S.Ct. 2006, 2016 (Scalia J. concurring).[4]

The present case then gives this Court the opportunity to give guidance on the issue of whether or not intervening state judicial decisions should be applied by federal court's of appeal to cases that have not become "final" as the term is applied in *Bradley.* Moreover, granting certiorari allows this Court to offer guidance concerning the scope of the term "sub judice" used in *Huddleston* if it is in fact more circumscribed than *Bradley's* definition of "final." In addition, this case gives this Court the opportunity to offer guidance on whether or not federal appeals courts should provide less difference to intervening state court decisions in *Erie* cases than they give to this Court's decisions on federal questions.

The administration of state law in federal courts should be uniform. Yet there is an apparent lack of uniformity among the circuits in applying intervening state decisions before the case becomes "final." This case presents the rare opportunity for this Court to address these issues and the Court should take it.

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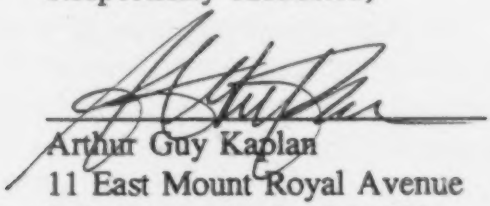
4 These cases included *Vandenbark v. Owen- Illinois Glass Co.,* 311 U.S. 538, 543, 61 S.Ct. 347, 350 (1941) which is the case on which *Huddleston* relies. *Huddleston v. Dwyer,* 322 U.S. 232, 237 64 S.Ct. 1015, 1018.

CONCLUSION

The court should grant Certiorari.

Respectfully submitted,



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Counsel for Petitioner

APPENDIX

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS,

Plaintiff-Appellant,

v.

No. 95-2568

THE CONTINENTAL INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland at Greenbelt.
Peter J. Messitte, District Judge.
(CA-94-3377-PJM)

Argued: May 6, 1996
Decided: August 6, 1996

Before WIDENER and NIEMEYER, Circuit Judges and PHILIPS, Senior Circuit Judge

---

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Kevin Thornton, KAPLAN & KAPLAN, P.A., Baltimore, Maryland, for Appellant. Gregory Ryder Black, SAUNDERS & SCHMIELER, Silver Spring, Maryland for Appellee. **ON BRIEF:** Jeffrey R. Schmieler, SAUNDERS & SCHMIELER, Silver Spring, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The unit owners of Lords Landing Village Condominium ("unit owners"), having obtained a $1.1 million judgment against the condominium developer, filed this action against the developer's insurance company, Continental Insurance Company ("Continental") to compel Continental to pay the judgment. Applying Maryland law, the district court concluded that the policy issued by Continental did not cover the loss because it did not arise from an "occurrence" within the meaning of the policy. We affirm.

In the underlying action, the unit owners sued the condominium developer, Wellington Homes, for numerous defects in the condominium complex, including a faulty fire protection sprinkler system, faulty insulation, and rotted wood resulting from a subcontractor's failure to prime wood components prior to painting. A jury rendered a verdict in favor of the unit owners against Wellington Homes for breach of express and implied warranties and misrepresentations and awarded the unit owners $1.1 million.

To collect the judgment, the unit owners instituted this action against Continental because it had issued a general liability policy covering Wellington during the applicable period. That policy provides payment for "those sums that [Wellington] becomes legally obligated to pay as damages because of `bodily injury' or `property damage' to which this insurance applies." And property damage is covered only if it is caused by an "occurrence," defined as "an accident,

including continuous or repeated exposure to substantially the same general harmful conditions."

The district court held that as a matter of law, property damage that is the natural, probable consequence of poor workmanship and omissions is not caused by an occurrence as defined by the policy. The court noted that there was no occurrence whether it was the subcontractor or a general contractor that was involved.

Appealing the district court's judgment, the unit owners contend that "the accident component of an occurrence must be viewed subjectively, and where the injury is not expected to intended from the standpoint of the insured an occurrence takes place." This contention, however, is based on the policy's exclusions and fails to take into account the policy's threshold requirement that property damage be caused by an "occurrence." If we were to interpret the policy as urged by the unit owners, we would be collapsing one of the policy's business risks exclusions into a threshold requirement for coverage. The policy in question does not provide coverage for all property damage, but only property damage that is caused by an "occurrence." Only if that threshold coverage is crossed must the exclusion alluded to by the unit owners be addressed, i.e., the exclusion for property damage that was "expected or intended from the standpoint of the insured." Accordingly, we must first address whether the loss was caused by an occurrence or accident.

"Under Maryland law in the context of insurance law `accident' means an `undersigned, sudden and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force, but it does

not mean the natural and ordinary consequences of a negligent act.'" *IA Construction Corp. v. T&T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (D.Md. 1993) (quoting *Ed. Winkler & Son, Inc. v. Ohio Casualty Ins. Co.*, 441 A.2d 1129, 1132 (Md. App. 1980) (quoting 7A Appleman, Insurance Law and Practice § 4492 at 17 (Berdal ed. 1979))) (holding that claims against contractor for work performed in reliance upon negligent work of another contractor did not constitute "occurrence" under general liability policy). Occurrence "does not include the normal, expected consequences of poor workmanship." *Reliance Ins. Co. v. Mogavero*, 640 F. Supp. 84, 86 (D.Md. 1986).

We agree with the district court that the damages awarded in the underlying action for breach of warranties and misrepresentations allegedly resulting from the poor workmanship of a subcontractor were not caused by an "occurrence" within the meaning of Continental's policy. "This is the stuff of the construction trade (and professional malpractice insurance), not a risk protected against by a general liability policy." *IA Construction Corp.*, 822 F. Supp. at 1215 (referring to one contractor's negligence causing liability of another contractor); *see also Mogavero*, 640 F. Supp. at 85 ("[t]his case turns upon one overriding principle: that [insurer] issued a general liability policy, not a performance bond"); *cf. American Home Assurance Co. v. Osbourn*, 422 A.2d 8, 13 (Md. App. 1980) (holding that action against service station operator for trespass and conversion did not constitute "occurrence").

Accordingly, we affirm the judgment of the district court.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 3, 1996

No. 95-2568
CA-94-3377-PJM

LORDS LANDING VILLAGE CONDOMINIUM
COUNCIL OF UNIT OWNERS

Plaintiff-Appellant

v.

THE CONTINENTAL INSURANCE COMPANY

Defendant-Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
ACTING CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 11, 1996

No. 95-2568
CA-94-3377-PJM

Lords Landing v. Continental Insur Co.

MANDATE

The judgment of this Court dated 8/6/96 takes effect today.

PATRICIA S. CONNOR
ACTING CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 EAST MAIN STREET
U.S. COURT HOUSE ANNEX
RICHMOND, VIRGINIA 23219

PATRICIA S. CONNOR
CLERK

TELEPHONE
(804) 771-2213

October 1, 1996

Gregory Ryder Black, Esq.
8737 Colesville Road
Suite L-201
Silver Spring, MD 20910

Jeffrey Roger Schmieler, Esq.
8737 Colesville Road
Suite L-201
Silver Spring, MD 20910

Re: 95-2568 Lords Landing v. Continental Insur Co
CA-94-3377-PJM

Dear Counsel:

The Court has requested that you file a response to appellant's petition for rehearing and suggestion for rehearing in banc, filed 9/20/96. Please file your response in the office of the clerk no later than 10/8/96.

Yours truly,

PATRICIA S. CONNOR
Clerk

By: /s/ Deborah S. Daniel
Deputy Clerk

cc: Kevin Thornton

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE
479-3011

November 21, 1996

Mr. Arthur G. Kaplan
11 East Mount Royal Avenue
Baltimore, MD 21202

Re: Lords Landing Village Condominium
Council of Unit Owners
v. Continental Insurance Company
Application No. A-365

Dear Mr. Kaplan:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on November 21, 1996, extended the time to and including January 1, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/

Gail B. Johnson
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE
479-3011

NOTIFICATION LIST

Mr. Arthur G. Kaplan
11 East Mount Royal Avenue
Baltimore, MD 21202

Mr. Jeffrey Schmieler
Saunders & Schmieler
8737 Colesville Road, #L-201
Silver Spring, MD 20910

Clerk
United States Court of Appeals for
the Fourth Circuit
1100 East Main Street
Room 249
Richmond, VA 23219

 Filed December 16, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2568

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS,

Plaintiff-Appellant,

versus

THE CONTINENTAL INSURANCE COMPANY,

Defendant-Appellee.

ORDER

This case was argued May 6, 1996, and our opinion affirming the district court was filed August 6, 1996. A petition for rehearing by the plaintiff-appellants was denied September 3, 1996, and our mandate was filed September 11, 1996.

On July 26, 1996, the Maryland Court of Appeals deed the case of Sheets v. Brethren Mutual, 342 Md. 634, 679 A.2d 540 (1996), which case did not come to the attention of the plaintiff-appellants before August 30, 1996. The plaintiff-appellants take the position that Sheets should have required a different disposition of this case than the disposition contained in our said decision filed August 6, 1996. The defendant-appellee does not agree that Sheets so requires.

On September 20, 1996, the plaintiff-appellants filed a petition to recall and stay our mandate, a motion to renew their petition for rehearing with en banc review of the same, and a motion to file a second petition for rehearing with en banc review of the same.

We required a response to the said motions and petition, which was filed October 8, 1996.

There having been no request for a poll of the court, the motions or petitions for en banc review in this case, however, the same may be called, shall be, and the same hereby are, denied.

We have considered the motion or petition to recall or stay our mandate, either or both; the motion to renew the plaintiff-appellants' petition for rehearing; and the motion for leave to file a second petition for rehearing. We are of opinion the said petition and motions are without merit.

It is accordingly ADJUDGED and ORDERED that all of the said petitions and motions above shall be, and they hereby are, denied.

With the concurrences of Judge Niemeyer and Judge Phillips.

H.E. Widener, Jr.

/s/

For the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS Plaintiff	*
v.	*Civil No. PJM 94-3377
CONTINENTAL INSURANCE COMPANY Defendant	*

FINAL ORDER

Upon consideration of Defendant's Motion to Dismiss and/or for Summary Judgment, Plaintiff's Opposition thereto, Plaintiff's Cross-Motion for Summary Judgment, Defendant's Opposition thereto, oral argument having been held on both motions, it is this 10 day of July, 1995, for the reasons stated on the record

ORDERED that Defendant's Motion to Dismiss and/or Motion for Summary Judgment is hereby GRANTED; and it is further

ORDERED that Plaintiff's Cross-Motion for Summary Judgment is hereby DENIED; and it is further

ORDERED that final judgment is hereby entered in favor of Defendant.

Plaintiff's Motion for Sanctions is hereby deemed to be MOOT.

/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS
Plaintiff-Appellant *

vs. * Case No. 95-2568

CONTINENTAL INSURANCE COMPANY
Defendant-Appellee *

* * * * * * * * *

AFFIDAVIT

I, Harvey Morrell, hereby certify that I am over 18 years of age and am competent to testify to the matters stated herein which I have personal knowledge thereof:

1. I am the Circulation/Reference Librarian at the University of Baltimore Law Library. As part of my duties I am familiar with the date the WEST ADVANCE SHEETS are received by the library.

2. The WEST ADVANCE SHEETS containing Maryland Reporters generally come into the Law Library five to eight days after the date appearing on the cover page of the WEST ADVANCE SHEETS.

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EXHIBIT 3

4. The WEST ADVANCE SHEETS for the official Maryland Reporters that contain the case of Robert T. Sheets, Jr. et ux. v. The Brethren Mutual Insurance Company 342 Md. 634 (1996), was not received by our library until September 13, 1996. Moreover, this WEST ADVANCE SHEET was not put out on the shelves for public use as of 11:00 a.m. on Friday September 20, 1996.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

/s/_____
Harvey Morrell

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS
Plaintiff-Appellant *

vs. * Case No. 95-2568

CONTINENTAL INSURANCE COMPANY
Defendant-Appellee *

* * * * * * * * *

AFFIDAVIT

I, June Karlin, hereby certify that I am over 18 years of age and am competent to testify to the matters stated herein which I have personal knowledge thereof:

1. I am the receptionist at the Law firm of Kaplan & Kaplan, P. A. As part of my duties I receive, open and stamp all incoming mail. I file the WEST ADVANCE SHEETS in our law library on the day they are received.

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September 20, 1996. A copy is attached to my Affidavit as Exhibit A, that confirms that advance sheets usually arrive within 5-7 days and are mailed 2nd Class Periodical Rate.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

/s/_____
June Karlin

17a

WEST PUBLISHING CORPORATION

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WESTLAW EXHIBIT A

STATUTES

MD. REAL PROP. CODE ANN. §10-202 (1988 Replacement Volume).

§10-202. Creation of express warranties; exclusion or modification of express warranty.

(a) Creation of warranties. - Express warranties by a vendor are created as follows:

(1) Any written affirmation of fact or promise which relates to the improvement and is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the affirmation or promise.

(2) Any written description of the improvement, including plans and specifications of it, which is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the description.

(3) Any sample or model which is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms substantially to the sample or model.

(b) Formal words unnecessary. - To create an express warranty, it is not necessary to use formal words, such as "warranty" or "guarantee," or that there be a specific intention to make a warranty. However, an affirmation merely of the value of the improvement or a statement purporting to be an opinion or commendation of the improvement does not create a warranty.

(c) Exclusion or modification of express warranty. - If an express warranty is made under subsection (a), neither words in the contract of sale, the deed, other instrument of grant, nor merger of the contract of sale into the deed or any other instrument of grant is effective to exclude or modify

the warranty. At any time after the execution of the contract of sale, the warranty may be excluded or modified wholly or partially by a written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the new agreement with respect to it. (An. Code 1957, art. 21, § 10-202; 1974 ch. 12, § 2.)

MD. REAL PROP. CODE ANN. §10-203 (1988 Replacement Volume).

§10-203. Implied warranties.

(a) Warranties which are implied. - Except as provided in subsection (b) or unless excluded or modified pursuant to subsection (d), in every sale, warranties are implied that, at the time of the delivery of the deed to a completed improvement or at the time of completion of an improvement not completed when the deed is delivered, the improvement is:

(1) Free from faulty materials;

(2) Constructed according to sound engineering standards;

(3) Constructed in a workmanlike manner; and

(4) Fit for habitation.

(b) Exception. - The warranties of subsection (a) do not apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the contract is signed.

(c) Implied warranty of fitness for a particular purpose. - If the purchaser, expressly or by implication, makes known to the vendor the particular purpose for which the improvement is required, and it appears that the purchaser relies on the vendor's skill and judgment, there is an implied warranty that the improvement is reasonably fit for the

purpose.

(d) Exclusion or modification of implied warranty.- Neither words in the contract of sale, nor the deed, nor merger of the contract of sale into the deed is effective to exclude or modify any implied warranty. However, if the contract of sale pertains to an improvement then completed, an implied warranty may be excluded or modified wholly or partially by a written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the new agreement with respect to it. (An. Code 1957, art. 21, § 10-203; 1974 ch. 12, § 2; 1976, ch. 572.)

MD. REAL PROP. CODE ANN. §11-131 (1995 Supp.).

§11-131. Warranties.

(a) Application of §§ 10-202 and 10-203; liability of developer for improvements. - (1) The provisions of §§ 10-202 and 10-203 of this article apply to all sales by developers under this title. For the purposes of this article, a newly constructed dwelling unit means a newly constructed or newly converted condominium unit and its appurtenant undivided fee simple interest in the common areas.

(2) If a developer grants an improvement to an intermediate purchase to evade any liability to a purchaser imposed by the provisions of this section, or by § 10-202 or § 10-203 of this article, the developer is liable on the subsequent sale of the improvement by the intermediate purchaser as if the subsequent sale had been effectuated by the developer without regard to the intervening grant.

(b) Warranty on unit from developer to owner. - In addition to the implied warranties set forth in § 10-203 of this article there shall be an implied warranty on an

individual unit from a developer to a unit owner. The warranty on an individual unit commences with the transfer of title to that unit and extends for a period of 1 year. The warranty shall provide:

(1) That the developer is responsible for correcting any defects in materials or workmanship in the construction of walls, ceilings, floors, and heating and air conditioning systems in the unit; and

(2) That the heating and any air conditioning systems have been installed in accordance with acceptable industry standards and:

(i) That the heating systems is warranted to maintain a 70° (F) temperature inside with the outdoor temperature and winds at the design conditions established by Article 78, § 54J of the Code ("Energy Conservation Building Standards Act"), or those established by the political subdivision as provided in Article 78, § 54J; and

(ii) That the air conditioning system is warranted to maintain a 78° (F) temperature inside with the outdoor temperature at the design conditions established by Article 78, § 54J of the Code ("Energy Conservation Building Standards Act"), or those established by the political subdivision as provided in Article 78, § 54J.

(c) Warranty on common elements.-(1) In addition to the implied warranties set forth in § 10-203 of this article there shall be an implied warranty on common elements from a developer to the council of unit owners. The warranty shall apply to: the roof, foundation, external and supporting walls, mechanical, electrical, and plumbing systems, and other structural elements.

(2) The warranty shall provide the developer is responsible for correcting any defect in materials or workmanship, and that the specified common elements are within acceptable industry standards in effect when the building was constructed.

(3) The warranty on common elements

commences with the first transfer of title to a unit owner. The warranty of any common elements not completed at that time shall commence with the completion of that element or with its availability for use by all unit owners, whichever occurs later. The warranty extends for a period of 3 years.

(4) A suit for enforcement of the warranty on general common elements shall be brought only by the council of unit owners. A suit for enforcement of the warranty on limited common elements may be brought by the council of unit owners or any unit owner to whose use it is reserved.

(d) Limitation of actions - Notice of defect shall be given within the warranty period and suit for enforcement of the warranty shall be brought within 1 year of the warranty period.

(e) Exceptions. - (1) Warranties shall not apply to any defects caused through abuse or failure to perform maintenance by a unit owner or the council of unit owners.

(2) The provision of this section do not apply to a condominium that is occupied and used solely for nonresidential purposes. (1981, ch. 246; 1982, ch. 836, § 3; 1986, chs. 360, 572; 1993. ch. 5, § 1.)

MD. COMMERCIAL LAW CODE ANN. § 13-301 (1995 Supp.).

§13-301. Unfair or deceptive trade practices defined.

Unfair or deceptive trade practices include any:

(1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;

(2) Representation that:

(i) Consumer goods, consumer realty, or

consumer services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have;

(ii) A merchant has a sponsorship, approval, status, affiliation, or connection which he does not have;

(iii) Deteriorated, altered, reconditioned, reclaimed, or secondhand consumer goods are original or new; or

(iv) Consumer goods, consumer realty, or consumer services are of a particular standard, quality, grade, style, or model which they are not;

(3) Failure to state a material fact if the failure deceives or tends to deceive;

(9) Deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with:

(i) The promotion or sale of any consumer goods, consumer realty, or consumer service; or

(ii) A contract or other agreement for the evaluation, perfection, marketing, brokering or promotion of an invention; or

(iii) The subsequent performance of a merchant with respect to an agreement of sale, lease, or rental.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

LORDS LANDING VILLAGE	:	
	:	
Plaintiff	:	
	:	
vs.	:	CAL NO. 92-23723
	:	
WELLINGTON HOMES, ET AL.	:	
	:	
Defendants	:	

VERDICT SHEET

1. Issue One involves implied warranties from Wellington Homes to the Council of Unit Owners at Lords Landing Village Condominium. Do you find that Defendant Wellington Homes breached this warranty obligation?

   For Plaintiff ___√___

   For Defendant _____

2. Issue Two involves implied warranties from Wellington Homes to each purchaser at Lords Landing Village Condominium. Do you find that Defendant Wellington Homes breached its warranty obligation to the individual purchasers at Lord Landing for common elements?

   For Plaintiff ___√___

   For Defendant _____

3. Issue Three involves express warranties to each purchaser at Lords Landing Village Condominium.

Do you find that Defendant Wellington Homes breached its express warranties to the individual purchasers at Lords Landing for common elements?

For Plaintiff ___√___

For Defendant _____

4. Issue Four is for violations of the Consumer Protection Act and it involves false or misleading statements. Do you find that Defendant Wellington Homes has violated the Consumer Protection Act under this Issue?

For Plaintiff _____

For Defendant ___√___

5. Issue Five is for violations of the Consumer Protection Act and it involves misrepresentations, omissions or statements by Defendant Wellington Homes that would lead Plaintiffs to believe that the common elements of the condominium had a quality, useful life or characteristics which they do not have. Do you find that Defendant Wellington Homes has violated the Consumer Protection Act under this issue?

For Plaintiff ___√___

For Defendant _____

6. Issue Six is for violations of the Consumer Protection Act and it involves concealment of the conditions at Lords Landing from the Plaintiffs. Do you find that Defendant Wellington Homes violated the Consumer

Protection Act under this issue?

For Plaintiff _____

For Defendant ___✓___

7. Issue Seven is for violation of the Consumer Protection Act and it involves fraudulent misrepresentations by the developer with regard to conditions of the common elements. Do you find that Defendant Wellington Homes violated the Consumer Protection Act under this issue?

For Plaintiff _____

For Defendant ___✓___

If you find in favor of the Defendant on all issues, that ends your verdict.

If you find in favor of the Plaintiff on any one issue, then in what amount do you assess damages?

Amount $1.1 mil

Supreme Court, U.S.
FILED
MAR 7 1997
OFFICE OF THE CLERK

No. 96-1033

In The

Supreme Court of the United States

October Term, 1996

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS,

Petitioner,

vs.

CONTINENTAL INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JEFFREY R. SCHMIELER
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(301) 588-7717

70713
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. Whether the holding in *Sheets v. Brethren Mutual,* 342 Md. 634, 679 A.2d 540 (1996) constitutes a controlling intervening state court decision which specifically rejects the standard used and the case law relied upon by the federal appellate court.

2. Whether the holding in *Sheets v. Brethren Mutual,* 342 Md. 634, 679 A.2d 540 (1996) is dispositive of the issue of Continental's duty to indemnify the insured under its Commercial General Liability Policy for breach of warranties and misrepresentations in violation of the Maryland Consumer Protection Act.

3. Whether the holding in *Sheets v. Brethren Mutual,* 342 Md. 634, 679 A.2d 540 (1996) and the basis upon which the court determined its holding, is distinguishable from the facts of the instant case.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Continental Insurance Company, n/k/a CNA Insurance Companies states that it has no parent companies or subsidiaries.

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Cheverly v. Ticor, 100 Md. App. 606, 642 A.2d 285 (1994) 7

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Morris v. Osmose Wood Preserving, 340 Md. 519, 667 A.2d 624 (1995) 8

Sheets v. Brethren Mutual, 342 Md. 634, 679 A.2d 540 (1996) ..... *passim*

Statutes Cited:

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COUNTER STATEMENT OF THE CASE

The instant case arises from an underlying tort suit involving *Lords Landing Village Condominium Council of Unit Owners v. Wellington Homes, et al.*, Civil Action No. 92-23723, decided on May 26, 1994 in the Circuit Court for Prince George's County, Maryland.[1] The trial of the case resulted in a jury verdict against the Insured, in the amount 1.1 million dollars based upon a finding that the Insured breached warranties and made misrepresentations in violation of the Maryland Consumer Protection Act.[2]

Prior to the aforestated litigation, Continental Insurance Company, (the insurer, hereinafter referred to as "Continental" and/or "Respondent"), on June 16, 1994, in conjunction with its earlier denial of coverage and reservation of rights letter previously sent to the Insured on April 2, 1993, confirmed that no coverage was afforded to the Insured based upon the clear exclusionary language contained within the applicable policy of insurance.

After the underlying judgment and a request on behalf of Petitioner to the Respondent to satisfy said judgment, which was refused, Petitioner filed a complaint in the Circuit Court for Prince George's County, Case Number CAL 94-22019, wherein it is alleged that the Respondent was responsible for the payment of the underlying tort judgment based upon the

---

1. Lords Landing Condominium Council of Unit Owners, hereinafter referred to as "Lords Landing" and/or "Petitioner." It is also noted that Wellington Homes, *et al.*, will be hereinafter referred to as the "Insured."

2. It is further noted that there was no finding by the jury that the Insured's liability dealt with work by subcontractors or negligent work by the Insured's subcontractors nor was their determination of liability based upon causes of action premised upon negligence.

allegation that the Respondent is obligated to pay all sums which the Insured becomes legally obligated to pay because of property damage or bodily injury on behalf of its Insured.

Pursuant to 28 U.S.C. § 1446(a) and 28 U.S.C. § 1332, Respondent removed the entire action to the United States District Court for the District of Maryland. On December 12, 1994, Respondent filed a Motion to Dismiss and/or for Summary Judgment. On January 9, 1995, Petitioner filed an Opposition. On April 13, 1995, Respondent filed a Supplemental Memorandum in support of its earlier Motion to Dismiss and/or for Summary Judgment. Petitioner responded with a Cross Motion for Summary Judgment and a Supplemental Response on June 1, 1995. Respondent thereafter filed an Opposition to the Cross Motion for Summary Judgment on July 6, 1995. On July 7, 1995, a Motions hearing was held before the Honorable Peter J. Messitte. At said hearing, Judge Messitte granted Summary Judgment in favor of the Respondent and denied the Petitioner's Cross Motion for Summary Judgment. A final Order with respect to the court's ruling was entered on July 10, 1995. Petitioner then filed a Notice of Appeal, appealing both decisions on August 4, 1995. The Fourth Circuit Court of Appeals thereafter affirmed the trial court's decision in an unpublished opinion on August 6, 1996. (App. 1a.) Petitioner then filed a Petition for Rehearing which was denied on September 3, 1996. (App. 5a.) Petitioner thereafter filed a Motion to Recall and Stay Mandate and to Renew Petitioner's Motion for Rehearing and En Banc Review and/or Leave to File a Second Petition for Rehearing and En Banc Review which was denied on December 16, 1996. On December 27, 1996, after receiving an extension of time with this Court, the Petitioner filed a Petition for Writ of Certiorari.[3]

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3. Respondent has elected to file a Counter Statement of the Case, even though most of the factual issues are not in dispute in view of the fact that the (Cont'd)

REASONS FOR DENYING THE WRIT

I.

THE HOLDING IN *SHEETS V. BRETHREN MUTUAL*, 342 Md. 634, 679 A.2d 540 (1996) IS NOT DISPOSITIVE OF THE ISSUE OF THE DETERMINATION OF LIABILITY COVERAGE UNDER CONTINENTAL'S COMMERCIAL GENERAL LIABILITY POLICY FOR BREACH OF WARRANTIES AND MISREPRESENTATIONS IN VIOLATION OF THE MARYLAND CONSUMER PROTECTION ACT, AND THEREFORE, DOES NOT CONSTITUTE A CONTROLLING INTERVENING STATE COURT DECISION WHICH SPECIFICALLY REJECTS THE STANDARD USED AND THE CASE LAW RELIED UPON BY THE FEDERAL APPELLATE COURT.

Contrary to the contention by the Petitioner that the issues before this Court arise from "principles of federalism", the proper issue before this Court is simply whether the holding in *Sheets v. Brethren Mutual*, 342 Md. 634, 679 A.2d 540 (1996) is dispositive of the issue of liability coverage for breach of warranties and misrepresentations in violation of the Maryland Consumer Protection Act. In the event that the holding in *Sheets v. Brethren Mutual*, 342 Md. 634, 679 A.2d 540 (1996) is not dispositive and/or is not a controlling intervening state court

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(Cont'd)
Petitioner has consistently alleged that the Insured's liability was based and/or founded upon negligent work done by its subcontractors. On the contrary, the Insured's subcontractors were not parties to the underlying tort suit, nor did the jury base their findings of liability upon actions and/or omissions on the subcontractors behalf. The finding of liability, as set forth by the jury verdict sheet, clearly dealt with breach of warranties and misrepresentations on behalf of the Insured, and no one else. (App. 24a.)

decision which specifically rejects the standard used and the case law relied upon by the federal appellate court, all remaining issues are moot, and the Petition for Writ of Certiorari, as a matter of law, must be denied.

By its own admission, Petitioner's case is premised exclusively upon the assumption that the holding in *Sheets v. Brethren Mutual,* 342 Md. 634, 679 A.2d 540 (1996) is dispositive of the issues of liability coverage in the instant case. Specifically, Petitioner argues that prior to the affirmation of the trial courts ruling by the Fourth Circuit Court of Appeals, the Maryland Court of Appeals issued a controlling decision in *Sheets v. Brethren Mutual,* 342 Md. 634, 679 A.2d 540 (1996) which the Petitioner contends constitutes a controlling intervening state court decision which specifically rejects the standard used and the case law relied upon by the federal appellate court. This is simply not the case. A close examination of the holding as set forth in *Sheets v. Brethren Mutual,* 342 Md. 634, 679 A.2d 540 (1996), reveals that said holding does not address, in any manner, the insurer's duty to indemnify within the context of a commercial general liability policy, nor does it address the issue of indemnity coverage within the context of breach of warranties and misrepresentations in violation of the Maryland Consumer Protection Act. As a result, said holding is easily distinguishable from the instant case.

In *Sheets v. Brethren Mutual,* 342 Md. 634, 679 A.2d 540 (1996), the insureds filed a declaratory judgment to determine whether their general liability insurer, within the context of a farm owner's policy, had a duty to defend or indemnify in a tort suit brought as a result of the sale of the insureds' farm. The underlying suit specifically alleged that in conjunction with the sale of the farm, the insureds both intentionally and negligently misrepresented that the septic system at their farmhouse was in

good working condition. *Id.* at 541. Approximately three weeks after the new owner took possession of the property, it was alleged that the septic system began leaking and flooded the walkway. The septic system was then condemned, and as a result, it was replaced at a cost of approximately $1,200. *Id.* The essence of the underlying complaint was that had it not been for the alleged misrepresentations, the purchasers would not have moved into the house.

After suit was filed, the insureds notified their insurance carrier (Brethren Mutual Insurance Company, "Brethren" and/or "Insurer") and requested that Brethren defend and indemnify pursuant to the terms of their farm owner's general liability policy. Brethren refused and the declaratory judgment was filed. A Motion for Summary Judgment was then filed on behalf of Brethren and granted by the trial court. This was appealed by the insureds. Prior to the time that the intermediate appellate court (Maryland Court of Special Appeals) considered the case, the Maryland Court of Appeals issued a Writ of Certiorari *sua sponte*. While the appeal was pending, the case was settled. *Id.* at 542.

Prior to addressing any of the opinions set forth in the declaratory judgment action, the Maryland Court of Appeals in Brethren specifically stated that:

> Preliminarily we note that since there is no information in the record concerning the settlement of the Christensens' suit against the Sheetses, we have no indication of how damages were calculated or whether the suit was settled on grounds of intentional or negligent misrepresentation. **Hence, we can not determine whether Brethren would have had a duty to indemnify the Sheetses.**

> **Consequently, we will discuss only Brethren's duty to defend and not its duty to indemnify.**

(Emphasis added). *Id.* As a result of this clear pronouncement from the court, it is unquestionable that from the very outset that the court in *Brethren* specifically recognized that its holding **did not address the issue of the insurer's duty to indemnify and expressly limited its opinions with respect to the insurer's duty to defend.**

To further clarify this position, the court in *Brethren* expressly recognizing the distinct difference between the duty to defend as opposed to the duty to indemnify by reiterating its previous holding in the seminal case of *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975), wherein the Maryland Court of Appeals held that:

> The obligation of an insurer to defend its insured under a contract provision such as here involved is determined by the allegations in the tort action. If the plaintiff in the tort suit alleges a claim covered by the policy, the insurer has a duty to defend. . . . Even if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a *potentiality* that the claim could be covered by the policy. (Emphasis in original).

Based upon the "potentiality doctrine" as set forth in *Brohawn*, it is well recognized in Maryland that an insurer's duty to indemnify is separate and distinct from its duty to defend. While duty to defend is determined by the allegations of the underlying

complaint and any extrinsic evidence presented or known to the insurer, **the duty to indemnify is determined by the facts as they ultimately are proven in the underlying action, either at trial or by some other definitive means.** *Cheverly v. Ticor,* 100 Md. App. 606, 642 A.2d 285 (1994). As a result, it is a fundamental principle that an insurer's duty to defend is broader than duty to indemnify. *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 659 A.2d 1295 (1995). Therefore, in view of the fact that the court in *Brethren* only addressed the issue of the insurer's duty to defend, and specifically stated that it was not addressing the issue of an insurer's duty to indemnify, said holding cannot, as a matter of law, have any precedential value or provide any guidance concerning the issue of indemnification.[4] Furthermore, since the basis of the decisions below were based primarily upon the issue of whether Continental owed a duty to indemnify the Insured as a result of the jury's verdict, the holding in *Brethren* cannot represent a "controlling intervening state court decision which specifically rejects the standard used and the case law relied upon by the federal appellate court." Therefore there was no failure on behalf of the federal appellate court to "apply intervening judicial decisions of Maryland's highest court" as the Petitioner contends.

The Petitioner also attempts to argue that the holding in *Sheets v. Brethren Mutual*, 342 Md. 634, 679 A.2d 540 (1996) outright rejects the use of an objective standard to determine what constitutes an "occurrence" or "accident" under a liability insurance policy and adopts a subjective standard whereby if a **negligent act** causes damage that is unforeseen or unexpected by the insured, the act constitutes an "accident." However, the

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4. It is an undisputed fact that Continental, pursuant to a timely reservation of rights letter, provided a full and complete defense to the Insured as a result of the allegations by the Petitioner, and therefore, fulfilled its duty to defend.

Petitioner fails to acknowledge that there is absolutely no indication from the Maryland Court of Appeals as to how they would decide the issue based upon **breach of warranties and misrepresentations within the context of indemnification**. As the Petitioner is aware, the opinion in *Sheets v. Brethren Mutual*, 342 Md. 634, 679 A.2d 540 (1996) is not only expressly limited to the issue of an insurer's duty to defend, it is also limited to the issue of negligent misrepresentation within the context of the insurer's duty to defend.

In the instant case, the jury expressly held that the Insured was liable for **breach of warranties and misrepresentations in violation of the Maryland Consumer Protection Act**, not Negligent Misrepresentation. In fact, all negligence counts, including the cause of action premised upon Negligent Misrepresentation in the underlying tort suit, were dismissed prior to trial in response to a Motion for Summary Judgment filed on behalf of the underlying tort defendant. In said Motion, the defendant argued that based upon the economic loss rule as set forth in *Morris v. Osmose Wood Preserving*, 340 Md. 519, 667 A.2d 624 (1995), the plaintiff, as a matter of law, could not proceed with causes of action sounding in negligence. As a result, Count Four, (Negligence) and Count Nine (Negligent Misrepresentation) were dismissed. Thus, all causes of action premised upon negligence were dismissed prior to trial and therefore could not have been included in jury's determination of liability.

In *Sheets v. Brethren Mutual*, 342 Md. 634, 679 A.2d 540 (1996) the court also stated that:

> we hold today that an act of negligence constitutes an accident under a liability insurance policy when the resulting damage was an event that takes place without the

> insured's foresight or expectation. . . . In other words, when a negligent act causes damage that is unforeseen or unexpected by the insured, the act is an accident under a genera liability policy.

Id. at 548. Therefore, the court has further limited its opinion to negligent acts that are "unforeseen or unexpected." Yet in the instant case, the Insured was held liable for breach or warranties and misrepresentations in violation of the Maryland Consumer Protection Act, **not causes of action premised upon negligence that were unforeseen or unexpected**. The negligent act in *Brethren* was that the owners allegedly failed to tell the purchasers about the true condition of the septic system. However there is no evidence in *Brethren* to support the fact that the owners had any knowledge with respect to the alleged defective condition of the sewer system nor is there any indication from the court that there were facts sufficient to establish that the sellers should have known of the alleged defective condition. However, the jury in the instant case expressly found that the Insured "lead the Plaintiffs to believe that the common elements of the condominium had a quality, useful life or characteristics which they do not have", App. 25a, and that the Insured "breached its warranty obligation to the individual purchasers at Lords Landing for common elements." (App. 24a.)

By the very nature of the jury's expressed findings, it is clear that the basis for the Insured's liability is easily distinguishable from the factual basis for the court's determination of the duty to defend in *Brethren*. Moreover, the findings on behalf of the jury in the instant case do not amount to "negligent acts that are unforseen or unexpected." There is simply no comparison. They are separate and distinct causes of action each requiring the establishment of separate and distinct

elements. There is no credible basis for a comparison between the two nor is there any indication in the jury's verdict that the basis of liability stemmed from negligent acts that were unforseen or unexpected. Therefore, even if the holding in *Brethren* could be applied to the duty to indemnify, which is denied, then and in that event, said holding is still inapplicable as the theory of the Insured's liability in the instant case has nothing to do with negligence.

Yet another faulty assumption concerning the facts of the underlying tort case is illustrated by the Petitioner's attempt to label the case as one arising out of negligence. This flawed strategy was not only expressly rejected by the trial court, this was also rejected by the federal appellate court. However, under the guise of "federalism", this essentially is what the Petitioner is attempting yet again. Petitioner seeks to have this Court determine that the actions on behalf of the Insured were tantamount to negligence and/or negligent work on behalf of the subcontractors. Once again, the Petitioner has elected to ignore the underlying jury verdict, *i.e.* the specific basis for liability on behalf of the Insured. The *Brethren* decision was never intended to be applied to the facts of the instant case. Clearly this is improper and impermissibly extends any such intended meaning well beyond the contemplated intent of the Maryland Court of Appeals. In fact, the only indication that is expressly stated by the court in *Brethren* is that the opinion is limited to the insurer's duty to defend. Therefore, the opinion as set forth in *Brethren* cannot and does not provide a basis upon which this Court or any court can determine the issue of liability coverage.

II.

PETITIONER DOES NOT RAISE AN IMPORTANT POLICY ISSUE.

Petitioner argues at length that the issue before the Court is one "federalism" and one of the "orderly administration of justice", however, the only support for this perceived theory is that the holding in *Sheets v. Brethren Mutual,* 342 Md. 634, 679 A.2d 540 (1996) "specifically rejects the standard used and the case law relied on by the federal appellate court."[5] Contrary to the Petitioner's belief, the salient issues before this Court have nothing to do with federalism or the orderly administration of justice. Petitioner's argument stems entirely from a self-serving interpretation of the holding in *Sheets v. Brethren Mutual*, 342 Md. 634, 679 A.2d 540 (1996), which is neither supported by the facts contained therein nor by the court's own language. The holding in *Brethren* clearly does not "specifically reject" the standard used by the federal appellate court based upon the statement by the court in *Brethren* that the opinion was not addressing the duty to indemnify. The only result obtained from *Brethren* is that based upon the "potentiality doctrine", the court decided that the insurer owed a duty to defend under the applicable policy with respect to the cause of action premised upon negligent misrepresentation. It certainly did not deal in any manner with the theory of liability in the instant case, *i.e.* breach of warranties and misrepresentations under the Maryland Consumer Protection Act. Furthermore, there is no indication that the federal appellate court failed to consider the holding in *Sheets v. Brethren Mutual,* 342 Md. 634, 679 A.2d 540 (1996). The most reasonable assumption is that as a result of the plain language as set forth in *Brethren,* the court decided that it did

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5. *See* Petitioner's Petition for Writ of Certiorari, *i.e.* Questions Presented.

not address the issue of the insurer's duty to indemnify for breach of warranties and misrepresentations, and was therefore, inapplicable. Therefore, despite Petitioner's efforts to classify this case as one of "federalism" based upon its perceived interpretation of *Sheets v. Brethren Mutual*, 342 Md. 634, 679 A.2d 540 (1996), the issue before the Court is Continental's duty to indemnify, which has already been decided by the trial court and the federal appellate court in the insurer's favor.

CONCLUSION

For the reasons set forth above, Respondent urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-1033

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LORDS LANDING VILLAGE CONDOMINIUM
COUNCIL OF UNIT OWNERS,

Petitioner,

v.

CONTINENTAL INSURANCE COMPANY,

Respondent.

Petition For Writ of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

PETITIONER'S REPLY MEMORANDUM

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Counsel for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS,

Petitioner,

v.

CONTINENTAL INSURANCE COMPANY,

Respondent.

PETITIONER'S REPLY MEMORANDUM

In its opposing brief Respondent argues that despite the decision in *Sheets v. Brethren Mutual*, 342 Md. 634, 679 A.2d 540 (1996), a federal court applying Maryland Law is free to use an objective standard to determine whether an occurrence has taken place under a general liability insurance policy, unless that action involves an insurer's duty to defend in a case based on an underlying negligence action.

In an attempt to persuade this Court that its position is correct Respondent:

(a) misleads the Court by intentionally failing to inform the Court of the jury instructions on which the verdict sheet was based;

(b) confuses "negligent acts" with negligence causes of action; and

(c) creates a scenario that would encourage forum shopping since principles of federalism would not require federal courts to follow Maryland's highest court's pronouncement that an objective test will render the policy all but meaningless.

Much of Respondent's argument is simply a red herring based on the faulty premises that a "negligent act" is the same as a negligence cause of action. More, troubling, however, is Respondent's false implication that the jury verdict sheet proves that Respondent's insured knew that its statements were false when they were made to the unit owners at Lord's Landing.

At page ten (10) of its brief, Respondent partially quotes from the jury verdict sheet in an attempt to show that the jury verdict against its insured required knowledge of the falsity of the insured's misrepresentation. In using this truncated quote to distinguish the present case from *Sheets*, Respondent fails to advise the Court that the jury instruction for issue number five (5) states:

> "This section of the Act does not require the seller to have knowledge of falsity or intent to deceive. This section only requires a false deceptive statement that has the capacity to mislead the consumer."App. 3a.[1]

In addition, Respondent failed to advise the Court that the

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[1]All App. sites in this Memorandum refer to the appendix for the Reply Memorandum. This includes the jury instructions for issues 5, 6 and 7 that were part of the record Extract below at pages 568 - 571. Petitioner has also included another copy of the verdict sheet for ease of comparison. The verdict sheet also appears in the appendix to the Petition for Certiorari.

jury instructions at count 6 involved concealment and count 7 did require scienter or knowledge. App. 3a - 4a. However, the jury found no liability on the part of the insured under these counts. App. 7a. (compare the jury verdict sheet and the jury instructions for issue five (5) with issues six (6) and seven (7) App. 3a - 7a. Thus there is no merit to the assertion that the jury found that Respondent's insured knew that its representations were false. In fact, the jury verdict sheet and jury instructions lead to an opposite conclusion.

Respondent's argument that *Sheets* is strictly limited to pure negligence causes of action involving a duty to defend, fares no better than its jury verdict argument. Respondent's analysis ignores the fact that negligent acts can give rise to a number of legal theories not just causes of action for negligence. For example, in rendering its opinion in *Sheets* Maryland's Court of Appeals harmonized and explained three negligent act cases that it had previously decided. Id. *Sheets*, 342 Md. at 650, 679 A.2d at 547.

The first of these cases was *Haynes v. Am. Cas. Co.*, 228 Md. 394, 179 A. 2d 900 (1962) which involved "a technical trespass... through the unwitting and heedless act of the insured's employees in going on the land of another..." Id. *Haynes,* 228 Md. at 399, 179 A.2d at 903. By listing the *Haynes* case as a negligent act case, the *Sheet's* Court recognized that negligent act cases are not limited to cases brought under pure negligence theories.

Moreover, the *Haynes* case did involve a suit for indemnification and the Sheets court recognized that at least one of the other cases it was harmonizing involved indemnification. *Haynes,* 228 Md at 395, 396, 179 A.2d at 901-902 ("...the instant action was filed...seeking damages for

breach of contract by the Appellee in not paying the judgment"); *Sheets* 228 Md at 651, 6679 A.2d at 549 ("... Contractor sought to recover the amount of the judgment from his insurer..."). Thus if Respondent's analysis was accepted a federal court could refuse to apply the *Sheets* holding to cases that had identical fact patterns to the very cases Maryland's highest court was harmonizing.

More importantly, in *Sheets* Maryland's highest court was forced to re-examine the test for an occurrence or accident that it had used in its earlier decisions, including the very cases that the trial court and Fourth Circuit relied on in the present case. Id. *Sheets* 342 Md. at 654, 679 A.2d at 549-550. In rendering its decision the Maryland court rejected the objective test used by the trial court and the Fourth Circuit. Id. *Sheets*, 342 Md. at 650-654; 679 A.2d 547-550. Thus the *Sheet's* decision has cast doubt on the use of an objective standard to determine whether an occurrence takes place and principles of federalism do require federal courts to follow *Sheets*. *Huddleston v. Dryer*, 322 U.S. 232, 236-237, 64SCt. 1015, 1017-1018 (1944).

Respectfully submitted,

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APPENDIX
UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
IN THE CIRCUIT COURT FOR PRINCE GEORGE'S
COUNTY
LORD'S LANDING VILLAGE CONDOMINIUMS,

Plaintiff,

vs. CIVIL ACTION LAW
NO: 92-23723

WELLINGTON HOMES,

Defendant,

_____/

OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Excerpt from Trial on the Merits)
VOLUME II OF II

Upper Marlboro, Maryland
Wednesday, May 25, 1994

BEFORE:

HONORABLE ARTHUR M. AHALT, Judge

APPEARANCES:

For the Plaintiff:
KEVIN THORNTON, ESQUIRE

For the Defendant:
KENNETH STALLARD, ESQUIRE
JOHN JUDE O'DONNELL, ESQUIRE

****

If the plaintiff has established that the defendant engaged any deceptive trade practices as I have defined them, by a preponderance of the evidence, then you should find for the plaintiff. If the plaintiff fails to establish that by a preponderance of the evidence, then you should find for the defendant.

The fifth issue for you to determine is another Consumer Protection Act requirement concerning the issue of "whether or not the developer made any misrepresentations, omission statements, that would lead the plaintiffs to believe that the common elements of the condominium had a quality useful life or characteristics which they do not, in fact, have."

In order for the plaintiff to meet that requirement of the statute, it has to show, by a preponderance of the evidence, that the defendant made a representation that "consumer goods, consumer realty or consumer services have a sponsorship approval, accessory characteristic, (unintelligible) use, benefit or quantity, which they do not have. A merchant has a sponsorship, approval status, affiliation, or connection which he does not have deteriorated, altered, reconditioned, reclaimed or second-hand consumer goods are original or new, or consumer goods consumer realty, consumer services are of a particular standard quality, grade, style or model which they are not, for consumer protection purposes, the meaning of any statement or representation is determined not only by what is explicitly stated, but also by what is reasonably applied.

"This section of the act does not require the seller to have knowledge of the falsity or intent to deceive. This section only requires a false deceptive statement that has the capacity to mislead the consumer."

So the plaintiff has to show by a preponderance of the evidence that Wellington Homes made representations, misrepresentations, omissions, or statements that would lead the plaintiffs to believe that the common elements at the condominium had a quality useful life or characteristics which they do not have.

The sixth issue which you have to determine is whether or not the plaintiff's have shown that the defendant's concealed any of the conditions at Lords Landing from the plaintiffs.

"The Maryland Consumer Protection Act prohibits a failure to state a material fact if the failure deceives or tends to deceive. An omission is considered material if a significant number of unsophisticated consumers would attach importance to the information in determining a choice of action. This section of the Act does not require the seller to have knowledge of the falsity or intent to deceive. This section requires only a false or deceptive statement that has the capacity to mislead the consumer."

The seventh issue that you must determine concerns an issue of a fraudulent misrepresentation by the defendant with regard to the conditions of the common elements.

"The Consumer Protection Act prohibits any deception, fraud, pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with the promotion or sale of consumer goods,

consumer realty, or consumer service, or a contract or other agreement for the evaluation, perfection, marketing, brokering, or promotion of an invention, or the subsequent performance of a merchant with respect to an agreement of sale, lease or rental. An omission is considered material if a significant number of unsophisticated consumers of goods or services would attach importance to the information in deciding on a course of action."

If the plaintiff proves, by a preponderance of the evidence, that there was a fraudulent misrepresentation, as I've just defined it, by the defendant, you should find for the plaintiff. If the plaintiff does not prove that by a preponderance of the evidence, you should find for the defendant.

If you find for the defendant on all of these issues, that ends your verdict. You will then have concluded that the plaintiff has not established, by a preponderance of the evidence, that under any of the theories of the cause of action, the plaintiff has established by a preponderance of the evidence, that the defendant is responsible for any of these conditions that may have existed at Lord's Landing.

On the other hand, if you find for the plaintiff for any one of those issues, then you should go on and determine a fair amount of money that will compensate the plaintiff for any loss that they have sustained as damages. And so there will be on your verdict sheet a question, "In what amount do you assess damages?"

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IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

LORDS LANDING VILLAGE	:	
	:	
Plaintiff	:	
	:	
vs.	:	CAL NO. 92-23723
	:	
WELLINGTON HOMES, ET AL.	:	
	:	
Defendants	:	

VERDICT SHEET

1. Issue One involves implied warranties from Wellington Homes to the Council of Unit Owners at Lords Landing Village Condominium. Do you find that Defendant Wellington Homes breached this warranty obligation?

   For Plaintiff ___√___

   For Defendant

2. Issue Two involves implied warranties from Wellington Homes to each purchaser at Lords Landing Village Condominium. Do you find that Defendant Wellington Homes breached its warranty obligation to the individual purchasers at Lord Landing for common elements?

   For Plaintiff ___√___

   For Defendant

3. Issue Three involves express warranties to each purchaser at Lords Landing Village Condominium. Do you find that Defendant Wellington Homes breached its express warranties to the individual purchasers at Lords Landing for common elements?

For Plaintiff √

For Defendant

4. Issue Four is for violations of the Consumer Protection Act and it involves false or misleading statements. Do you find that Defendant Wellington Homes has violated the Consumer Protection Act under this Issue?

For Plaintiff

For Defendant √

5. Issue Five is for violations of the Consumer Protection Act and it involves misrepresentations, omissions or statements by Defendant Wellington Homes that would lead Plaintiffs to believe that the common elements of the condominium had a quality, useful life or characteristics which they do not have. Do you find that Defendant Wellington Homes has violated the Consumer Protection Act under this issue?

For Plaintiff √

For Defendant

6. Issue Six is for violations of the Consumer Protection Act and it involves concealment of the conditions at Lords Landing from the Plaintiffs. Do you find that Defendant Wellington Homes violated the Consumer Protection Act under this issue?

For Plaintiff

For Defendant ✓

7. Issue Seven is for violation of the Consumer Protection Act and it involves fraudulent misrepresentations by the developer with regard to conditions of the common elements. Do you find that Defendant Wellington Homes violated the Consumer Protection Act under this issue?

For Plaintiff

For Defendant ✓

If you find in favor of the Defendant on all issues, that ends your verdict.

If you find in favor of the Plaintiff on any one issue, then in what amount do you assess damages?

Amount $1.1 mil

(4)

SUPREME COURT OF THE UNITED STATES

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS, PETITIONER *v.* CONTINENTAL INSURANCE COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96–1033. Decided June 2, 1997

PER CURIAM.

In this diversity case, the holding of the federal appellate court below has been called into question by a recent decision of the highest state court in Maryland. We must decide whether it is appropriate, in these circumstances, for this Court to grant the petition for certiorari, vacate the judgment of the lower court, and remand the case (GVR) for further consideration.

Petitioners, an association of condominium owners, sued respondent in Maryland state court, seeking to compel respondent to pay a $1.1 million judgment they had obtained against respondent's insured, the developer of their condominium complex. In a previous action, a jury had held the developer liable for numerous defects in the complex, finding that the developer had made misrepresentations and breached various warranty obligations. Respondent had issued a general liability insurance policy covering the developer. The policy provided that respondent would pay "'those sums that [the developer] becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies.'" App. to Pet. for Cert. 2a. Under the policy, "property damage" was covered only if it was caused by an "accident."

Respondent removed the action to the United States District Court for the District of Maryland, based on the

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parties' diversity of citizenship. The District Court granted summary judgment in favor of respondent. On August 6, 1996, the Court of Appeals for the Fourth Circuit affirmed. The Court of Appeals held that, as a matter of Maryland law, an "accident" does not include the "natural and ordinary consequences of a negligent act." *Id.*, at 4a (internal quotation marks omitted) (citing *IA Construction Corp.* v. *T&T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (1993) (quoting *Ed. Winkler & Son, Inc.* v. *Ohio Casualty Ins. Co.*, 51 Md. App. 190, 194–195, 441 A. 2d 1129, 1132 (1982))). Because the damages awarded in the underlying action were for breach of warranties and misrepresentations relating to poor workmanship, the Court of Appeals concluded that the damages were not caused by an "accident" within the meaning of respondent's insurance policy. The Court of Appeals denied a petition for rehearing on September 3, 1996, and issued the mandate on September 11, 1996.

On September 17, 1996, petitioners' counsel learned of *Sheets* v. *Brethren Mutual Ins. Co.*, 342 Md. 634, 679 A. 2d 540, a recent decision of the Maryland Court of Appeals—the highest court in Maryland. (Although *Sheets* was handed down on July 26, 1996, 11 days before the Court of Appeals' decision, the parties were not aware of the decision until after the mandate was issued, and therefore had not brought the case to the attention of the Court of Appeals. Pet. for Cert. 11.) *Sheets* cast doubt on the soundness of the Court of Appeals' decision because it held that "an act of negligence constitutes an 'accident' under a liability insurance policy when the resulting damage was 'an event that takes place without [the insured's] foresight or expectation.'" 342 Md., at 652, 679 A. 2d, at 548 (citation and internal quotation marks omitted). The Maryland Court of Appeals also expressly disapproved *Ed. Winkler & Son, supra*, at 1132, and *IA Construction Corp., supra*, at 1215, two decisions on which the Court of Appeals had primarily relied. 342 Md., at 654–655, and 654, n. 4, 679 A. 2d, at 549–550, and 550, n. 4.

On September 20, 1996, petitioners filed a motion asking the Court of Appeals to recall or stay its mandate based on this development in Maryland law. In its response, respondent argued in part that the Court of Appeals lacked authority to recall an already issued mandate. In a brief order, the Court of Appeals denied petitioners' request, ruling only that "the said petition and motions are without merit." App. to Pet. for Cert. 11a. Petitioners now ask us to grant certiorari, vacate the judgment below, and remand the case to the Court of Appeals for further consideration in light of *Sheets*. Pet. for Cert. 13–14.

This case fits within the category of cases in which we have held it is proper to issue a GVR order. "Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate." *Lawrence* v. *Chater*, 516 U. S. ___ (1996) *(per curiam)*. The situation here is virtually identical to that in *Thomas* v. *American Home Products, Inc.*, 519 U. S. ___ (1996), a state-law case from earlier in this Term. There, after the Court of Appeals for the Eleventh Circuit ruled against petitioners, the Georgia Supreme Court overruled the holding that was the basis for the federal appeals court's holding. *Id.*, at ___ (SCALIA, J., concurring). The appellate court nevertheless denied a petition for rehearing, and we GVR'd. As JUSTICE SCALIA wrote in concurrence, our order was in keeping with our "longstanding practice" of vacating a court of appeals' decision based on a construction of state law that appears to contradict a recent decision of the highest state court. *Id.*, at ___. "[A] judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts

when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones." *Huddleston* v. *Dwyer,* 322 U. S. 232, 236 (1944) *(per curiam).*

Given *Sheets'* explicit disapproval of the cases on which the Court of Appeals based its decision, there is reason to question the correctness of the Court of Appeals' decision. It is true that petitioners brought *Sheets* to the attention of the Court of Appeals in a motion to stay or recall its mandate and that the Court of Appeals denied this motion. But the Court of Appeals' ambiguous statement that petitioners' request was "without merit" does not establish that it actually considered and rejected petitioners' *Sheets* argument. In opposing petitioners' motion, respondent argued that a court of appeals lacks authority to recall its mandate, and the Court of Appeals may have rested its denial of petitioners' motion on this procedural ground. Respondent does not argue otherwise. Indeed, the procedural ground is by far the most likely, given *Sheets'* explicit repudiation of the precedent on which the Court of Appeals' original judgment hinged. Moreover, we have at least once before issued a GVR order where petitioners notified the federal court of appeals of an intervening state supreme court's opinion in a second petition for rehearing, which the court of appeals denied. See *Huddleston, supra,* at 235.

In these circumstances, we now grant certiorari, vacate the judgment below, and remand the case to the Court of Appeals for further consideration.

SUPREME COURT OF THE UNITED STATES

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS, PETITIONER
v. CONTINENTAL INSURANCE COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96–1033. Decided June 2, 1997

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BREYER joins, dissenting.

In *Thomas* v. *American Home Products, Inc.*, 519 U. S. ___ (1996), the Court granted, vacated, and remanded a decision of the Court of Appeals for the Eleventh Circuit for reconsideration in the light of a decision of the Georgia Supreme Court that was handed down after the Court of Appeals had denied a petition for rehearing. The lower court there had had no opportunity to consider the impact of the new state law decision.

Here, by contrast, *Sheets* v. *Brethren Mutual Ins. Co.*, 342 Md. 634, 679 A. 2d 540 (1996), was expressly considered by the court below. Although *Sheets* was not brought to the attention of the Fourth Circuit until after it had rendered its decision and denied rehearing, petitioner raised it nonetheless before that court in a motion to recall or stay the mandate. Petitioner's motion did not fall on deaf ears; indeed, the Fourth Circuit went to the unusual lengths of requesting a response to the motion and then, after the response was received, issuing a written order rejecting the claim. The only question discussed in that order is whether "*Sheets* should have required a different disposition of this case than the [original] disposition." App. to Pet. for Cert. 10a. And the court resolved that question, concluding

"[w]e are of [the] opinion the said petition and motions are without merit."* *Id.*, at 11a.

If this Court has, without any briefs on the merits, concluded that the Court of Appeals' refusal to alter its opinion in the light of *Sheets* was wrong, it should either set the case for argument or summarily reverse. True, this would require the investment of still more time and effort in a case that is in the federal courts only by reason of diversity of citizenship, see *Thomas*, *supra*, at ___ (REHNQUIST, C. J., dissenting), but it would have the virtue of explicitly telling the Court of Appeals how to dispose of the case. The Court's decision to grant, vacate and remand in the light of *Sheets*, on the contrary, is muddled and cryptic. Surely the judges of the Court of Appeals are, in fairness, entitled to some clearer guidance from this Court than what they are now given.

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*Although it is possible to construe this statement as being based on the procedural impropriety of raising such an issue on a motion to recall the mandate, such a construction is nowhere suggested in the order, nor is it the natural implication of the language ("without merit") used by the court below. I see no reason for us not to take the Fourth Circuit's order at face value.